ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 13, 2010

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2010-10385

Dear Ms. Chang:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 386374 (Houston ORR# 17049).

The City of Houston (the "city") received a request for copies of documents submitted by the winning bidder in two specified solicitations. You inform us that some of the information encompassed by the present request is the subject of a previous open records letter ruling. Although you take no position as to the public availability of the submitted bid proposals, you state their release may implicate the proprietary interests Wackenhut Corporation ("Wackenhut"). Accordingly, you inform us, and provide documentation showing, that you notified Wackenhut of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). Wackenhut responded to the notice and argues that portions of the information at issue are excepted from disclosure under section 552.110 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

You state that some of the information responsive to the present request was encompassed by a previous request, as a result of which this office issued Open Records Letter No. 2009-08594 (2009). In that ruling, we concluded that the city must withhold portions of Wackenhut's information under section 552.110 of the Government Code and release

Wackenhut's remaining information. You do not indicate that there has been any change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude that the city must continue to rely on Open Records Letter No. 2009-08594 with respect to the information responsive to the present request that is encompassed by the previous ruling.[1] *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

Next, we address Wackenhut's arguments under section 552.110 of the Government Code for the information not encompassed by the previous ruling. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

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[1]As we are able to make this determination, we do not address Wackenhut's arguments against disclosure of this information.

(1) the extent to which the information is known outside of [the company's] business;

(2) the extent to which it is known by employees and others involved in [the company's] business;

(3) the extent of measures taken by [the company] to guard the secrecy of the information;

(4) the value of the information to [the company] and to [its] competitors;

(5) the amount of effort or money expended by [the company] in developing this information; and

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see also* ORD 661 at 5-6.

Upon review, we find Wackenhut has failed to present a *prima facie* claim that any of the remaining information they seek to withhold qualifies as a trade secret under section 552.110(a). In addition, we find Wackenhut has made only conclusory allegations that release of the remaining information at issue would cause its company substantial competitive harm and have provided no specific factual or evidentiary showing to support such an allegation for purposes of section 552.110(b). *See* Open Records Decision Nos. 661
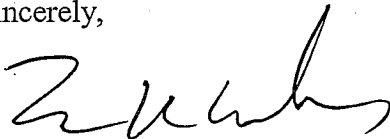
(for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Additionally, we note that the pricing information of a winning bidder, such as Wackenhut in this instance, is generally not excepted under section 552.110. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. We therefore conclude that none of the remaining information is excepted from disclosure under section 552.110 of the Government Code.

In summary, the city must continue to rely on Open Records Letter No. 2009-08594 with respect to the information responsive to the present request that is encompassed by the previous ruling. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 386374

Enc.   Submitted documents

c: Requestor
        (w/o enclosures)

        Glory Ross
        Director & Associate Counsel
        The Wackenhut Corporation
        4200 Wackenhut Drive
        Palm Beach Gardens, Florida 33410
        (w/o enclosures)